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IN THE

Supreme Court of the United States

DORA B. SCHRIRO, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

WARREN WESLEY SUMMERLIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* WELSH S. WHITE, RUDY GERBER, W. J. MICHAEL CODY, AND THE SOUTHERN CENTER FOR HUMAN RIGHTS IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

Amici adopt the questions presented as articulated in the Respondent's brief.

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STATEMENT OF INTEREST[1]

This case presents a question regarding the importance of the Sixth Amendment right of criminal defendants to a jury determination of the facts necessary to impose a death sentence. *Amici* are individuals and an organization with a particular interest in this Court's death penalty jurisprudence. Professor Welsh White has written extensively on the subject of the historic role of the jury in criminal cases generally and capital cases in particular. Rudy Gerber is an Arizona practitioner who handles death penalty cases *pro bono*. Mr. Gerber is a former Arizona appellate judge and was also involved in drafting the Arizona death penalty statute that was held to be unconstitutional in *Ring* v. *Arizona*, 536 U.S. 584 (2002). W. J. Michael Cody tried capital cases as the former attorney general of the State of Tennessee. He also has served as a United States Attorney for the Western District of Tennessee and as chair of the Tennessee Sentencing Commission and the Tennessee Supreme Court Commission on Indigent Defense.

The Southern Center for Human Rights has been engaged in litigation, public education, and advocacy since 1976 to protect the civil and human rights of people prosecuted in the criminal courts and confined in the prisons and jails of the South—particularly those facing the death penalty. The Center's lawyers provide direct representation to people facing the death penalty at trials, on appeals, and in post-conviction review.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief, and the letters of consent have been lodged with the Clerk. Pursuant to Rule 37.6 of this Court, we state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *Amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF FACTS

To avoid burdening the Court with another recitation of the facts, *Amici* adopt the statement in the Respondent's brief.

SUMMARY OF ARGUMENT

This case raises the same specter of unconstitutional decision making in capital cases that was raised in *Ring* v. *Arizona*, 536 U.S. 584 (2002): namely, that a man may go "to his death because a *judge* found that an aggravating factor existed." *Id.* at 612 (Scalia, J., concurring). Warren Wesley Summerlin was sentenced to death as the result of a process that violated his Sixth Amendment right to a jury trial of all elements necessary to impose a death sentence. No one disputes this. As this Court held in *Ring*, the Arizona death penalty statute under which Mr. Summerlin was sentenced, Ariz. Rev. Stat. § 13-703, did not satisfy the requirements of the Sixth Amendment because "it allow[ed] a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609. The sole question raised by this case is whether Mr. Summerlin, whose conviction became final before *Ring* was decided, is entitled to the same constitutional protections afforded the Petitioner in *Ring*.

Amici respectfully submit that *Ring* must apply retroactively for at least two alternative reasons—both grounded in the historic role of juries in capital cases: first, the decision in *Ring* implicated *substantive*, and not merely procedural, rights. As a result, the retroactivity bar of *Teague* v. *Lane*, 489 U.S. 288 (1989) (plurality opinion), for new rules of criminal procedure does not apply. Second, even if the decision in *Ring* could fairly be understood as a new rule of criminal procedure, it should nevertheless apply retroactively because it satisfies the second exception articulated in *Teague*: namely, it "requires the observance of those procedures that . . . are implicit in the concept of

ordered liberty." *Id.* at 307 (internal quotation marks omitted) (quoting *Mackey* v. *United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part)). However the Court chooses to characterize its earlier decision in *Walton* v. *Arizona*, 497 U.S. 639 (1990) (plurality opinion), construing the same death penalty scheme, *Ring* not only confirms a bedrock constitutional principle, it also recognizes that having a jury, rather than a judge, determine all facts necessary to impose a death sentence is consistent with, and indeed mandated by, an extremely long common law history, much of which underlies the Sixth Amendment. According to that history, the jury is the principal and indispensable mechanism for determining those facts necessary to impose a death sentence. For many hundreds of years, the jury has been seen as "more accurate" in the sense that it more accurately reflects the "common sense" judgment of the community, see *Ballew* v. *Georgia*, 435 U.S. 223 (1978) (plurality opinion), that a defendant should be sentenced to death.

Amici write separately to underscore the fundamental and historic nature of the right to a jury determination of all elements necessary to sentence a defendant to death. That history, not articulated in any detail by the other briefs submitted to the Court, makes clear that the Sixth Amendment guarantees that a criminal defendant is entitled to have a jury rather than a judge make the "factfinding necessary to put him to death." *Ring*, 536 U.S. at 609. That guarantee rings hollow unless it applies retroactively.

Lastly, *Amici* note that the concerns of comity and finality that gave rise to *Teague* have little force in the context of the decision articulated in *Ring*. With respect to comity, *Ring* only recognizes and corrects the fundamental misunderstanding of Arizona state law that led to this Court's decision in *Walton*. The responsibility for that error rests with the Court and its correction and retroactive application offend comity only insofar as the Arizona courts themselves

perpetuated (and were forced to perpetuate) that error. See *State* v. *Ring*, 25 P.3d 1139, 1152 (Ariz. 2001) ("*Ring I*") *rev'd*, 536 U.S. 584 (2002) (recognizing that the State is bound by *Walton* even though *Walton* misstated Arizona law). Where, as here, the underlying state legislation as well as state court interpretations of that legislation are driven by *federal* case law, the argument for comity is a tenuous one. As for finality, it hardly seems just or reasonable to invoke it against Mr. Summerlin, who has been contending for over 20 years—since before his sentence became final—that the Sixth Amendment entitles him to a jury determination of all facts necessary to sentence him to death, precisely the right vindicated in *Ring*. See J. A. at 49-50.

ARGUMENT

I. THE HISTORIC ROLE OF JURIES IN CAPITAL CASES DEMONSTRATES THAT *RING* ANNOUNCED A SUBSTANTIVE RULE.

A. At English Common Law, The Jury Played An Indispensable Role In Determining The Facts Necessary To Sentence A Defendant To Death.

As early as the thirteenth century, jury trials became the standard method for establishing guilt for felonies. See Thomas A. Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 Mich. L. Rev. 413, 421 (1975-1976) (hereinafter "Green I"). The medieval jury had exclusive control over the evidence necessary to make findings of fact, and judges were powerless to second-guess these findings. See *id.* at 424-25. Recognizing that their control of the evidence enabled them to determine whether a sentence of death could be imposed, juries frequently used their fact finding power to decline to condemn to death defendants guilty of less-culpable forms of homicide, prefiguring gradations that would later be enshrined in the law. See *id.*

The breadth of the jury's control of the trial process diminished somewhat in the sixteenth and seventeenth centuries with the "shift from a trial dominated by the self-informing jury to a trial based mainly on evidence produced by the prosecution." *Id.* at 491. But the jury remained the sole finder of fact, and continued to wield its power to spare from death those guilty of less-culpable forms of homicide by rendering verdicts entitling defendants to the "benefit of clergy," which would preclude capital punishment. See *id.* at 494. Capital homicide came to be defined as killing with "'malice aforethought.'" See 1 *Model Penal Code and Commentaries*, pt. 2, § 210.2, at 14 (1980) (herinafter "*MPC*"). With the emergence of this refined category of capital homicide came the requirement that an indictment for homicide specify the fact of "malice aforethought" in order for the death penalty to be an available sanction upon conviction. See 2 J. Bishop, *New Commentaries Upon The Criminal Law* § 727(2) (8th ed. 1892).

The extent of the jury's factfinding power generated tensions between juries and judges, who perceived that juries often misrepresented the facts to spare defendants from hanging. See Green I, *supra* at 496-97 & n.304. But in a sequence of clashes that defined the contours of the English jury right, the jury's fact finding power was declared paramount. In a celebrated case, the parliament censured Lord Chief Justice John Kelyng for his manipulation of juries in several cases tried between 1665 and 1667. See Thomas A. Green, *Verdict According to Conscience* 208 (1985). Among the most serious charges were allegations that the Chief Justice had threatened juries with fines to coerce them to raise their verdicts from non-capital manslaughter to capital murder. See *id.* at 214. Three years later the widely-noted Bushell's Case held that fact-finding was the province of juries, and that jurors could not be fined or imprisoned for their verdicts. See Green I, *supra* at 497 n.304.

B. This Unique Role Was An Integral Part Of The Sixth Amendment's History And Adoption.

The Framers adopted the Sixth Amendment against this long tradition of jury control over factfinding in capital cases. Colonial Americans understood the traditional right to a jury trial as precluding encroachments upon the jury's factfinding power with respect to criminal—and particularly capital—punishment. As this Court observed in *Ring* :

> [T]he English jury's role in determining critical facts in homicide cases was entrenched. As fact-finder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense. Moreover, *the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established.* Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind. By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned.

536 U.S. at 599 (quoting *Walton*, 497 U.S. at 710-11 (Stevens, J., dissenting) (internal quotation marks omitted)).

The debate over the jury's role in seditious libel cases around the time of the adoption of the Bill of Rights underscores the central role of the jury in making factual determinations that stand as a predicate for imposition of a death sentence.[2] In the sedition context, the hotly-contested

[2] As this Court has recognized in considering that history:

> There was apparently some accepted understanding at the time that the finding of facts was simply too sacred a jury prerogative to be trifled with in prosecution for such a significant and traditional offense [seditious libel] in the common law courts. That this history had to be in the minds of the Framers is beyond cavil.

issue was not whether the jury's factfinding power could be infringed, but rather whether the jury should wield the power to find the law as well. See generally *Jones* v. *United States*, 526 U.S. 227, 246-47 (1999). For example, in a 1735 American case that attracted widespread attention on both sides of the Atlantic, Andrew Hamilton, attorney for a New York printer charged with seditious libel, relied upon the jury's power to determine whether the evidence amounts to murder or manslaughter to argue, by analogy, that the jury should also have the power to decide whether an article published by a newspaper was libelous or not. See J. Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* 91 (2d ed. 1972).[3] Although the judge did not permit Hamilton to present to the jury evidence going to the truthfulness of the statements (*i.e.*, evidence that would inform whether the statements were libelous or not), Hamilton successfully introduced the idea to the jury by arguing that "the words themselves must be libelous—that is false, scandalous, and seditious, or else we are not guilty." V. Buranelli, *The Trial of Peter Zenger* 99 (1957). After hearing this argument, the jury acquitted. *Id.* The point of this and cases like it was not that the crime of libel had to include particular elements, but rather that the presence or absence of those elements—whatever they were—had to be determined by a jury.

State innovations in capital sentencing following the adoption of the Bill of Rights confirmed the jury's essential role. In 1794, Pennsylvania refined its capital sentencing scheme by creating a class of homicides called "first-degree" murder. Prior to that time, states generally applied the common-law classifications of homicide: a capital form

Jones v. *United States*, 526 U.S. 227, 247 (1999) (footnote omitted).

[3] Under New York colonial law (similar to English law), the jury's role was to determine (1) the fact of publication, and (2) at whom the comments were made. *See* Alexander, *supra*, at 91. The actual finding of "libel" was left to the judge. *Id.*

labeled "murder" and a non-capital form labeled "manslaughter." See *MPC* § 210.2, at 16; *id.* § 210.6, at 121-22. Responding to a popular perception that the death penalty was not appropriate for all defendants guilty of murder, Pennsylvania narrowed its definition of capital homicide to include only murders of "'the first degree,'" defined as those "'perpetrated by means of poison, or by lying in wait, or by any kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary.'" *Id.* § 210.6, at 123 (quoting 1794 Pa. Laws, ch. 257, §§ 1, 2). The Pennsylvania innovation quickly spread to other states and became the predominant form of capital homicide in America. See *id.* § 210.6, at 123-24. In the course of these innovations, it remained universally understood that the jury, and the jury alone, would make the factual determinations that state law required for the imposition of a death sentence.

Over the past two centuries, the States have continued to revise their definitions of capital murder. Despite its initial popularity, the Pennsylvania scheme came to be seen as inadequate to "achieve a rational or intelligible limitation of capital murder." *Id.* § 210.6, at 124. Many found the limiting language confusing or unfair as applied. See *id.* § 210.6, at 124-26. Moreover, juries commonly "balked at conviction of the capital offense," even under the narrower definition, and returned guilty verdicts on a lesser offense or even acquitted defendants rather than find them guilty of first degree murder. *Id.* § 210.6, at 129-30. This dissatisfaction led to the next major innovation, introduced by Tennessee in 1838, which allowed juries to determine whether the facts justified a capital sentence in each case. The scheme introduced that year in Tennessee and subsequently adopted by many other states—including Arizona—provided that the jury would first determine the defendant's guilt of the highest degree of homicide, and *then* decide whether the death penalty was appropriate.

C. Until *Furman* v. *Georgia*, 408 U.S. 238 (1972), Arizona's Death Penalty System Required The Jury To Find All Facts Necessary To Sentence A Defendant To Death.

Arizona's experience parallels these historical trends. Arizona's first penal laws were copied almost in their entirety from the Penal Code of California (see Ariz. Rev. Stat., Penal Code Preface (1913)), and, like California, included a Pennsylvania-style definition of first-degree murder, see *id.* § 172, and further specified that the death penalty could be imposed for that crime only "at the discretion of the jury." *Id.* § 173. Under the 1901 Code and subsequent codes, the jury had sole responsibility to determine "the degree of the crime." See, *e.g.*, § 972 (1901), § 1090 (1913). Following a partial abolition of the death penalty between 1916 and 1918 (see 1917 Ariz. Sess. Laws, Initiative and Referendum Measures 4-5; 1919 Ariz. Sess. Laws, Initiative and Referendum Measures 17-21), Arizona reenacted, in 1919, the pre-existing provisions regarding first-degree murder and the death penalty, including jury degree-finding and sentencing, and this system remained virtually unchanged until 1973. See Ariz. Rev. Stat. §§ 4584, 4585 (1928); Ariz. Rev. Stat. §§ 43-2902, -2903 (1939).

The Arizona Supreme Court described that system as follows: the homicide statute "does not have the effect of creating two grades of the offense, one of which is punishable by death and the other by life imprisonment." *Hernandez* v. *State*, 32 P.2d 18, 21 (Ariz. 1934). The court went on to observe that, because the statute committed to the jury the choice between death and life in prison, the trial court must *not* do anything more than instruct the jury on the elements of the offense and the jury's responsibility to select the appropriate sentence: "A choice between these two penalties having been committed to the jury, it should be permitted to discharge this function unaffected and uninfluenced by any statement of the court as to what portions of the evidence it

shall consider in determining the matter." *Id.* Thus, under Arizona law from the early twentieth century until 1973, (1) the jury decided between life or death; (2) its decision was "unguided" by aggravating factors; (3) juries decided the degree of the homicide charge; and (4) the statutory definition of first degree murder included undifferentiated capital and non-capital options.

On June 29, 1972, this Court held Georgia's death penalty statute unconstitutional in *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam), because jurors, like those in *Hernandez*, were given no standards for capital sentencing, an error this Court recognized as rendering a death sentence cruel and unusual because of its potential arbitrariness. Because the procedure in every capital state matched that in Georgia, Furman effectively invalidated every state death penalty statute then existing. Bound by *Furman* and subsequent decisions of this Court, Arizona courts invalidated the sentencing scheme then in effect. See *State* v. *Endreson*, 506 P.2d 248, 254 (Ariz. 1973).

Furman prompted extensive efforts to redefine capital homicide among those states wishing to retain it. Although *Furman* did not dictate any specific model to the States, many states (including Arizona) adopted a model that had been suggested a decade earlier in the American Law Institute's Model Penal Code. The Model Penal Code effectively redivided first degree murder into capital and non-capital variants, providing that first degree murder would be punishable by death only when at least one of several enumerated "aggravating circumstances" was found to be present. See *MPC* § 210.6, at 107-10; cf. Ariz. Rev. Stat. §§ 13-703, -1105.

As part of the response to *Furman*, Arizona and a few other states went further and assigned the responsibility for finding these aggravating factors not to the jury, but to a single judge. Thus, under Arizona law in 1973, a trial judge sitting alone would now make findings on the existence of each of the new

statutory aggravating and mitigating circumstances. If the judge found an aggravating circumstance, the burden then shifted to the defendant to present sufficient mitigation to the judge or the death penalty would be imposed. See Ariz. Rev. Stat. § 13-703.A; see also *Arizona* v. *Rumsey*, 467 U.S. 203, 210 (1984) (describing the Arizona scheme).

Thus, for the first time in some seven centuries of Anglo-American jurisprudence, a criminal defendant could be sentenced to death by something less than a jury determination of all the elements of the offense necessary to impose such a sentence.

In *Walton* v. *Arizona*, 497 U.S. 639 (1990), the Court upheld this scheme. Specifically, the Court, relying on its prior decision in *Poland* v. *Arizona*, 476 U.S. 147 (1986), rejected the argument that the aggravating factors in Arizona constituted "elements of the offense," and concluded instead that, under the law in effect at the time, they were merely "standards to guide the making of the choice between the alternative verdicts of death and life imprisonment." *Walton*, 497 U.S. at 648 (internal quotation marks and alterations omitted).

In *Ring*, the Court recognized that its interpretation of the Arizona sentencing scheme in *Walton* was mistaken and overruled *Walton*. The Court concluded that, because the aggravating factors operated as "the functional equivalent of an element of a greater offense," the Arizona scheme violated the Sixth Amendment. 536 U.S. at 609 (internal quotation marks omitted).

D. This History Confirms That Both *Walton* And *Ring* Addressed Issues Of Substantive Law And Not "Merely" Procedure.

Both Petitioner and the United States as *Amicus Curiae* attempt to press the *Ring* decision into the *Teague* framework—and thereby avoid the retroactive effect of *Ring*—by characterizing the "new" rule of *Ring* as simply addressing

the question of "who must be the decisionmaker on a particular fact, or how that decisionmaker should go about deciding the fact." Brief of United States ("U.S. Brief") at 7; see also Pet. Br. at 7. By cribbing the holding of *Ring* in such fashion, they attempt to argue, by extension, that *Ring* "presents a quintessentially procedural issue." U.S. Br. at 7.

This argument is wrong on at least two counts. First, when viewed through the long prism of history, the entirety of the debate in this area was not over a simple "procedural" question of *who* makes the relevant determination, but a substantive debate over *what* constitutes a capital crime and therefore what factors fall within the unique province of the jury. In this light, *Ring* plainly announced a decision that was, at least in part, substantive with regard to the nature of capital offenses. Second, the repeated attempts of Petitioner and her *Amici* to characterize the *Ring* decision as "merely" announcing a procedural change or "simply" affecting "who" may decide relies upon a faulty semantic distinction between substance and procedure that ignores the fundamental and historic nature of the Sixth Amendment right confirmed in *Ring*.

(1) The decisions in both *Walton* and *Ring* are substantive in nature. If Petitioner is correct that the decision in *Ring* turns only on the "the identity of the decisionmaker" (see U.S. Br. at 12), then *Walton* must stand for the proposition that a judge can decide some of the "elements" necessary to sentence a defendant to death, while *Ring* must stand for the opposite proposition. In fact, this would mischaracterize *both* holdings.

As this Court has recognized, *Walton* did *not* hold that a judge can determine certain facts necessary to impose a sentence of death. Rather, *Walton* held—based on a mistaken interpretation of Arizona law—that a judge could determine which homicide defendants were death eligible. See *Jones*, 526 U.S. at 251 (characterizing *Walton*). Put differently, *Walton* held that the judge-determined aggravating factors

were not "elements" of the offense; consequently, it was appropriate for the judge to decide them. See *Ring*, 536 U.S. at 598 (also characterizing *Walton*). Thus, *Walton* turned on a substantive (if erroneous) interpretation of Arizona law.

The rule reaffirmed in *Ring* was similarly substantive. Certainly, the analysis in that decision cannot be dismissed as involving only the procedural question of "who decides." In particular, the Court considered—and rejected—several substantive arguments that Arizona put forward in defense of its death penalty scheme. As the Court recognized, despite Arizona's arguments to the contrary, "[i]n effect, the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict." *Id.* at 604 (internal quotation marks and alterations omitted). Moreover, regardless of how the State chose to characterize the aggravating factors, under the Arizona scheme they constituted "elements" of the offense. See *id.* at 605; see also *id.* at 609 ("Because Arizona's enumerated aggravating factors operate as '*the functional equivalent of an element* of a greater offense,' *Apprendi*, 530 U.S., at 494, n.19, the Sixth Amendment requires that they be found by a jury.") (emphasis added).

The effect of *Ring* is that the jury now sets the grade of first degree murder by finding the defined "attendant circumstances," and thus elevates first-degree to capital murder. Finding these facts establishes a separate, substantive offense.

(2) Second, Petitioner and her *amici* repeatedly mischaracterize the "substance" of the Sixth Amendment right reaffirmed in *Ring*, attempting to trade on a semantic distinction between "substance" and "procedure" that disregards the character and history of that right and that, in any event, is not nearly as clear as Petitioner would like.

For example, the Brief of the United States is shot through with subtle efforts to downplay the significance of the right at issue in *Ring*. See, *e.g.*, U.S. Brief at 9 ("*Ring*, in turn, simply

applied *Apprendi*" "[A] *Ring* error . . . . consists merely in the failure to submit a single factual issue to the jury"); *id.* at 12 ("*Ring* . . . merely placed a constitutional constraint on the identity of the decisionmaker"); *id.* at 15 ("The Court in *Ring* simply held . . . ."). This flurry of adverbs is hardly appropriate to describe a right characterized by Blackstone as 'the grand bulwark' and 'palladium' of English liberty. See *Jones*, 526 U.S. at 246 (emphasis omitted) (quoting 4 Blackstone, *Commentaries* 342-43 (1769)); see also *Apprendi* v. *New Jersey*, 530 U.S. 466, 477 (2000) (describing the Sixth Amendment right to trial by jury as the "'great bulwark of [our] civil and political liberties'") (alteration in original) (quoting 2 J. Story, *Commentaries on the Constitution of the United States* 540-541 (4th ed. 1873)).

Moreover, Petitioner's "procedural" argument rests upon a distinction between "substance" and "procedure" that is not nearly so clear as Petitioner would have it. The Court itself has often called into question the legitimacy and efficacy of these semantic categories. See, *e.g.*, *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 727 (1988) (plurality opinion) ("[T]he words 'substantive' and 'procedural' themselves . . . do not have a precise content . . . ."); see also *Mistretta* v. *United States*, 488 U.S. 361, 392 (1989) (describing the challenge of distinguishing between "substantive" and "procedural" rules as a "logical morass"). In any event, for all the reasons shown above, Petitioner's characterization of *Ring* as articulating "merely" a rule of procedure is wrong.

Finally, it is not at all obvious, even if this case were only about "who decides" (as opposed to what must be deemed elements of a capital offense for constitutional purposes), that Petitioner's effort to cast this case as merely procedural would succeed. After all, the Framers recognized that for serious crimes such as libel "the finding of facts was simply too sacred a jury prerogative to be trifled with." *Jones*, 526 U.S. at 247. Moreover, this Court has never suggested that the question of "who decides" is a matter of "mere"

procedure. Cf., *e.g.*, *Brown* v. *Louisiana*, 447 U.S. 323, 330 (1980) (describing the right to trial *by jury* as an "indispensable protection"); *Duncan* v. *Louisiana*, 391 U.S. 145, 158 (1968) (describing the right as a "fundamental right, essential for preventing miscarriages of justice"). At bottom, the rule announced in *Ring* will require far more substantive changes in the Arizona scheme than any purely procedural rule would warrant.

II. EVEN IF *TEAGUE* GOVERNS, *RING* SHOULD APPLY RETROACTIVELY BECAUSE IT RE-DEFINED A BEDROCK PRINCIPLE OF CONSTITUTIONAL LAW.

Assuming, in the alternative, that *Ring* announced a "new" rule of constitutional "procedure" and, consequently, is subject to analysis under *Teague*, *Ring* should nevertheless apply retroactively because it redefined a bedrock principle of constitutional law. As indicated above, if *Ring* announced a "new" rule of constitutional procedure (the jury must decide all elements necessary to sentence a defendant to death), then it necessarily must have replaced the "old" rule announced in *Walton* (a judge can decide one or more of those elements). See *supra* at 12. As such, *Ring* would satisfy the second *Teague* exception because it "requires observance of those procedures that . . . are implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 307 (internal quotation marks omitted) (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part)).

In *Teague*, this Court articulated a test to apply to new rules of criminal procedure to determine whether such rules should apply retroactively on collateral review. See *id.* at 299-311. *Teague* specifically adopted standards originally articulated by Justice Harlan in *Mackey* v. *United States*, 401 U.S. 667, 692-95 (1971) (plurality opinion). The second *Teague* exception, and the only one potentially relevant in this case, recognized that even a new rule of procedure should be applied retroactively on collateral review if it implicates

procedures that are "implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 307 (internal quotation marks omitted). *Teague* refined this second exception further by concluding that such exceptions should apply only to "watershed" rules of criminal procedure: *i.e.*, rules that implicate both the "fundamental fairness" element of *Mackey*, and the "accuracy" element articulated by Justice Harlan's dissenting opinion in *Desist* v. *United States*, 394 U.S. 244 (1969). This latter element focused on whether the new rule at issue would create an "impermissibly large risk that the innocent will be convicted" if the Court fails to apply it retroactively. *Id.* at 262 (Harlan, J., dissenting).

On its face, this second "accuracy" element does not seem to apply to a jury determination of facts necessary to sentence a defendant to death, at least not in the usual way that term is applied. In that context the relevant "accuracy" consideration is not whether an "innocent [defendant] will be convicted," *id.*, but whether the factfinding process will accurately determine whether death is an appropriate sanction. Put differently, in the death penalty context, the "accuracy" at issue is more the accuracy of the process than the accuracy of the result.[4] See generally Note, *Ninth Circuit Holds That The Supreme Court's Decision in Ring v. Arizona Applies Retroactively To Cases On Habeas Corpus Review*, 117 Harv. L. Rev. 1291, 1295-96 (2004) (explaining why the Ninth Circuit should have focused on "procedural" rather than "results-oriented" accuracy in analyzing the issues presented in the instant case).

Thus, in the capital context, the appropriate inquiry in evaluating retroactivity is (1) whether the rule implicates

[4] Otherwise, the analysis would turn on the difficult question of whether judges or juries are more accurate fact finders—a consideration that this Court has held cannot define the proper scope of a defendant's Sixth Amendment rights. *See Ring*, 536 U.S. at 607 ("The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders.").

matters of fundamental fairness, and (2) whether it enhances the accuracy (the procedural accuracy) of the proceedings. By these measures, *Ring* should apply retroactively.

First, for all the historical reasons shown in Part I, *supra*, the right to a jury determination of all facts necessary to impose a death sentence implicates matters of fundamental fairness. This Court concluded as much in *Ring* itself:

> Entrusting to a judge the finding of facts necessary to support a death sentence might be "an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. . . . [But] [t]he founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial was one of the least controversial provisions of the Bill of Rights."

536 U.S. at 607 (omission in original) (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J. concurring)); *accord Duncan*, 391 U.S. at 156 ("Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.").

To see how this implicates fundamental fairness, one need only consider how differently Mr. Summerlin's sentencing phase would have looked had he originally been accorded his Sixth Amendment right to a jury determination of all facts necessary to impose the death sentence. Had the jury been required to find the aggravating factors, both the prosecution and the defense would have had to marshal evidence on those factors and formally present that evidence to a jury of Mr. Summerlin's peers. Doubtless, the process would have looked far different than what actually occurred in Mr. Summerlin's case. See *Summerlin* v. *Stewart*, 341 F.3d 1082, 1089 (9th Cir. 2003) (describing the brevity of Mr. Summerlin's sentencing hearing).

Second, having the jury find all facts necessary to the imposition of a death sentence is more accurate because long-established tradition both in the United States and at Common Law suggests that society trusts juries—rather than judges—to more accurately reflect the common sense judgment of the community in determining the facts necessary to sentence a defendant to death. See generally *Williams* v. *Florida*, 399 U.S. 78, 100 (1970) ("[T]he essential feature of the jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . . .").

This value draws strength, not from the Eighth Amendment (which implicates community values in a different way),[5] but from the Sixth Amendment itself. As shown above, this value dates back to early English common law, in which juries wielded almost exclusive control over the facts necessary to sentence a defendant to death, see Green I, *supra,* at 424-25, and through the adoption of the Bill of Rights, see *Jones*, 526 U.S. at 247-48. As such, the Sixth Amendment right to a jury determination of all facts necessary to impose a sentence of death, see *Ring*, 536 U.S. at 609, is a "bedrock" principle of law, and, to the extent *Walton* marked a deviation from that principle, *Ring* marked a "watershed" reaffirmation of that right.

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[5] The point is not whether and to what extent community values inform whether capital punishment is appropriate in and of itself, as in *Atkins* v. *Virginia*, 536 U.S. 304, 316 (2002) (concluding that a "national consensus" dictates the execution of mentally retarded defendants is "cruel and unusual"); rather, the point is that within the framework of capital cases, our legal traditions reserve an indispensable role for the jury to reflect the "common sense of the community" in determining whether a defendant should be *eligible* for the death penalty. *Cf. Ballew*, 435 U.S. at 232 (Blackmun, J.) (plurality opinion) (observing in the context of the Sixth Amendment that juries must be of sufficient size to properly apply the "common sense of the community" to the facts).

III. THE PRINCIPLES OF COMITY AND FINALITY THAT UNDERLIE THE RULE ANNOUNCED IN *TEAGUE* HAVE LITTLE FORCE IN THE CONTEXT OF THIS CASE.

Lastly, an analysis of the principles of comity and finality that underlie *Teague* confirms that *Teague* does not apply to *Ring* or, alternatively, that *Ring* should apply retroactively under *Teague*'s second exception. In *Mackey* v. *United States*, 401 U.S. 667 (1971), Justice Harlan observed that "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Id.* at 693 (Harlan, J., concurring in part and dissenting in part). Although he made that statement in the context of discussing what later became enshrined as the first *Teague* exception, the idea embodied in that statement applies with equal force here. *Amici* respectfully submit that the criminal process should never have been permitted to reside at a point where a mistaken federal interpretation of state law sanctioned an unconstitutional death penalty scheme. The principles of comity and finality should have little force in such cases, where the state decisions at issue are themselves based on mistaken interpretations of state law by federal courts.

In this case, both the underlying Arizona statute held unconstitutional in *Ring* and state court interpretations of that statute were driven by federal case law. More specifically, the capital sentencing scheme that Arizona had in place until 1973 fully complied with the requirements of the Sixth Amendment in that a jury—rather than a judge—had to make all factual determinations necessary to impose a sentence of death. When Arizona modified that scheme in 1973 in an effort to comply with *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam), it unwittingly vitiated the Sixth Amendment rights of capital defendants by assigning to the sentencing judge the responsibility to make factual determinations as to the aggravating factors. This Court

upheld Arizona's scheme in *Walton*, 497 U.S. at 649, and Arizona courts were compelled to follow *Walton* even though it mis-characterized Arizona law. See, *e.g.*, *Ring I*, 25 P.3d at 1152 (recognizing that the State is bound by *Walton*).

In short, both the underlying Arizona statute *and* the state courts' defense of that statute were driven by this Court's decisions. Moreover, *Walton* avoided the fundamental question later addressed in *Apprendi* and *Ring* only by misinterpreting Arizona state law. Having admitted in *Ring* that *Walton*'s interpretation of Arizona's death penalty statute was inaccurate, there would be something manifestly unjust in denying Mr. Summerlin's claims based on principles of comity.

Although finality remains a consideration, that principle alone cannot justify denying to Mr. Summerlin the benefit of the rule announced in *Ring*. For over 20 years, Mr. Summerlin has been making the argument that he was denied his full Sixth Amendment rights when an Arizona state judge, sitting without a jury, determined that aggravating circumstances warranted the death penalty—the precise reasoning adopted belatedly in *Ring*. Indeed, he made this argument on direct appeal before his sentence became final. See J. A. at 49-50. Thus, it would be bitter irony to deny this claim on the principle that he is raising it too late. More importantly, however important the principle of finality may be in the abstract, standing alone it must give way before a preeminent constitutional value such as the one raised here: the right of a criminal defendant to have a jury determine all facts necessary to the imposition of the death penalty.

CONCLUSION

For all these reasons, the decision of the Ninth Circuit granting Mr. Summerlin's writ of habeas corpus should be affirmed.

Respectfully submitted,

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